

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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NOV 10 1993

In the Matter of )

Implementation of Section 309(j) )  
of the Communications Act )  
Competitive Bidding )

PP Docket No. 93-253

To: The Commission

COMMENTS OF PALMER COMMUNICATIONS INCORPORATED

Palmer Communications Incorporated ("Palmer"), by its attorneys and pursuant to Rule Section 1.415, submits its Comments on the Commission's proposal to implement competitive bidding to choose from among mutually exclusive applications for initial licenses to provide service to subscribers for compensation.<sup>1/</sup> In support, the following is shown:

I. Introduction.

1. Palmer and its affiliates are diversified communications providers in the broadcast, common carrier and specialized mobile radio services. In addition, Palmer is a majority female owned and controlled company. As such, it is acutely sensitive to the Congressional mandate and the Commission's proposals that the competitive bidding process be structured so as to promote "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women" (collectively "Designated Entities"). NPRM at para. 13. The issues raised by this Congressional mandate, and other important issues presented in the

<sup>1/</sup> Competitive Bidding, FCC 93-455, 8 FCC Rcd \_\_\_\_, (October 12, 1993) ("NPRM").

NPRM, as they relate to the auction proposal for award of Personal Communications Service licenses, are discussed below.

**II. Issues related to Designated Entities.**

**A. Preference items.**

2. Palmer supports the Commission's conclusion to set aside two blocks of PCS spectrum, the 20 MHz Block C, and the 10 MHz Block D, for bidding by the Congressionally Designated Entities. Palmer also supports the proposed preferences for Designated Entities, such as installment payment plans and the use of tax certificates. Palmer believes, however, that in certain respects the NPRM does not go far enough in making economic opportunity available to the Designated Entities. Thus Palmer would supplement the NPRM's proposals in two significant ways. First, Palmer would make the above listed preference items available to Designated Entities when they apply for other frequency blocks; and, second, Palmer would provide to Designated Entities an additional preference item of a ten percent bidding credit when they bid for non-set aside frequency blocks.

3. Palmer believes it essential to making meaningful opportunity available for Designated Entities that whatever preferences the Commission extends to them also be extended to them when they bid for non-set-aside frequency blocks. The number of Designated Entities is likely to be large and competition for the two set-aside blocks rigorous. The extension of preference items to non-set-aside blocks would go a long way toward equalizing the

historic limitations of Designated Entities in such areas as lack of capital, credit discrimination, etc.<sup>2/</sup>

1. Bid payment methods.

4. Palmer supports the Commission's proposal to allow a successful Designated Entity bidder for a frequency block to employ alternative payment options. These alternatives should include installment payment plans ranging from five to ten years, with reasonable interest charges,<sup>3/</sup> as well as royalty payment

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<sup>2/</sup> Although it is perhaps more appropriately raised on reconsideration of the Commission's PCS proceeding, See GEN Docket 90-314, Palmer suggests that the Commission relax the constraints placed on cellular providers proposing to offer PCS within their cellular service areas when the cellular provider is a Designated Entity. Recognizing the economies of scale which could be achieved in such circumstances and the historic difficulty such entities have in access to capital, the Commission should double the allowable percentage of service overlap to 20 percent from 10 percent before such restrictions are triggered, and the Commission should increase to 20 MHz, the amount of PCS spectrum which the cellular entity may hold in its service area. This relaxation of the cellular/PCS cross-ownership constraint will thus serve to allow cellular entities which are also Designated Entities to bid on the set-aside 20 MHz C block of frequencies in their service areas.

<sup>3/</sup> Interest rates could be set using a variety of mechanisms, such as the Wall Street Journal Prime Rate, or they could be tied to the yield of comparable U.S. Treasury securities. Palmer suggests that the latter approach most reasonably ties the auction proceeds to the government's cost of funds. Palmer suggests that winning bid Designated Entities be given the choice of having the interest rate on their installment payments float at 50 basis points above the one year Treasury Bill, repriced yearly (either on a date certain for all such licensees, or on the anniversary date of the award of each particular license), or at a fixed rate 50 basis points over the yield of the comparable U.S. Treasury Note. Thus, for example, if the five year U.S. Treasury Note were yielding 6.5 percent, the interest rate paid by the Designated Entity which elected a five year installment payment would be seven percent. The reason for the 50 basis point spread above the  
(continued...)

arrangements.<sup>3/</sup> Especially given the historic problems faced by minorities and women in access to capital as well as subtle (and not so subtle) forms of credit discrimination, such alternatives are particularly necessary to offer the opportunity for meaningful participation in the PCS industry.

## 2. Tax certificates.

5. Tax certificates should be used to defer federal taxation on any transaction involving the transfer or assignment of stock or FCC license to or from a Designated Entity for the first full license term. Additionally, tax certificates should be granted to Designated Entities for expenditures in relocating existing users of the recently reallocated PCS spectrum.

## 3. Bidding credits.

6. The provision of bidding credits would be an important factor in equalizing the economic opportunity for Designated Entities, and especially remedying past economic and social discrimination against minorities and women. Even in today's marketplace, access to capital by small businesses and minority owned businesses suffers. Indeed, in the past few years it has been readily apparent how the credit crunch has depressed economic activity. The current economic situation pointedly shows that

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<sup>3/</sup>(...continued)

government's cost of funds is to compensate the Treasury for the potential costs of a Designated Entity's default, including the cost of re-auctioning the frequency if a default should occur.

<sup>4/</sup> The royalty should be some reasonable percentage of subscriber revenues during the first term of the license, not to exceed five percent.

despite record low interest rates, banks are slow to lend to any entity perceived as less than an optimum credit risk. The plain fact is, just as Congress recognized, those persons who are Designated Entities do not have the access to capital possessed by more established enterprises. As a way to ensure adequate economic opportunity to such persons, Palmer suggests the Commission provide that all Designated Entities receive a 10 percent bidding credit when bidding for non-set-aside frequency blocks.<sup>5/</sup>

**B. Eligibility criteria.**

7. In accordance with Congress's intent, the Designated Entities should include small businesses,<sup>6/</sup> rural telephone companies, and minority and female controlled entities. Palmer does not believe that any "local presence" requirement should be imposed to obtain Designated Entity status. The Commission's goal is to encourage economic opportunity for all such enterprises. Imposing a "local presence" requirement can only discourage their participation in PCS.

8. Palmer believes that Designated Entities should make a sufficient application showing of their qualifications, and that the failure to present a sufficient showing of qualifications

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<sup>5/</sup> Such a bidding credit would be an economic wash with respect to set-aside frequency blocks since all bidders for those blocks would receive the credit.

<sup>6/</sup> Palmer supports the NPRM's proposal to define small businesses consistent with the definition employed by the Small Business Administration ("SBA"). However, since many entities are likely to be startup companies, the net worth and revenue figures for the SBA analysis of such enterprises should be calculated by reference to these entities' individual shareholders, and businesses controlled by them.

should subject a winning bidder seeking Designated Entity status to dismissal and loss of any deposits submitted. The required showing should demonstrate that Designated Entities own or control a majority of the voting interest of the bidding entity, and that Designated Entities have the beneficial right to receive more than 50 percent of the profits (or cash distributions, as applicable) of the bidder.<sup>17</sup>

9. A significant issue upon which the NPRM requests comment is the constitutional justification for preferences for minority and female applicants. NPRM at para. 73. Noting the holding of Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 560-63 (1990), that benign race or gender conscious measures mandated by Congress are constitutionally permissible to the extent the record convincingly shows (1) they serve important governmental objectives (2) within the power of Congress and (3) are substantially related to the achievement of those objectives, the NPRM seeks to build a record to justify these preferences.

10. In this case, there is no doubt it is an important governmental objective to foster economic opportunity for minorities and women, and that this is an objective within the power of Congress under both the Commerce Clause and the Fourteenth Amendment to the Constitution. The general lack of minority and

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<sup>17</sup> This would limit the opportunity for the formation of abusive applicants to take advantage of preferences, as has been seen in the broadcast realm. For example, one could not create a bidder eligible to receive preferences by naming a Designated Entity a general partner in a limited partnership, with the majority of the equity held by non-Designated Entities.

female owned businesses, and the specific dearth of such ownership in the communications industry, is well known, and is discussed at length in the Metro decision. Moreover, the Commission's Small Business Advisory Committee's September 15, 1993 Report in the PCS proceeding (at pp. 3-5), found that women and minorities "have encountered special barriers to telecommunications ownership." Indeed, the Report states that women owned firms account for less than two percent of the industry subgroup containing communications firms, and that there were only 11 minority firms engaged in the delivery of cellular, SMR, radio paging, or messaging services in the United States. Id. at 4. The Report further concludes that lack of available financing and the legacy of invidious discrimination are important factors behind the underrepresentation of minority and female communications providers. Id. at 4-5.

11. Given this clear record, there can be no serious doubt that the selective easing of the financial burdens attendant to bidding for PCS spectrum is substantially related to the achievement of the objective of fostering ownership of emerging communications enterprises. Accordingly, there clearly exists both a record to support Congress's mandate, and a close fit between the proposals advanced herein and the Congressional goal to increase economic opportunities for minorities and women.

**C. License holding periods.**

12. Palmer supports a reasonable holding period for licenses in the set-aside blocks, or in other blocks which are awarded to Designated Entities benefiting from preferences. However, inasmuch

as any required holding period tends to result in market distortion and inefficiency, Palmer would limit the required holding period to one year after initial commencement of public service. Such a holding period would ensure that Designated Entities actually construct their systems and place them in operation providing public service before transferring them. It is important, however, that any required holding period not serve to limit the ability of Designated Entities to finance construction through public offerings of equity and debt. Accordingly, public offerings of less than a 50 percent interest in an entity, or where existing shareholders do not sell stock to the public in an offering, should be exempt from such a holding period.

**D. Advance payment and financial qualifications.**

13. Palmer supports requiring advance payments even among Designated Entities to be eligible to bid for licenses. Advance payments should not constitute a serious handicap if the entity is financially qualified. The advance payment, in the form of cash, irrevocable letters or credit, or other immediately available funds, should be presented, but not tendered, to the Commission at or before the auction as a precondition of bidding. Palmer suggests that the showing of the advance payment be made as part of the application so that a written record is maintained of its tender. Unsuccessful bidders would have their advance payments returned immediately after the auction. Only the payment of auction winners should be deposited by the Commission, as it would be wasteful, unwieldy and imprudent for the Commission to collect



and then attempt to refund large numbers of such payments. Palmer also supports the Commission's proposal that the amount of the advance payment to bid for PCS be set at two cents per pop per MHz. This is a reasonable qualifying factor for applicants, demonstrating each one's financial ability to become a PCS licensee.

14. Palmer supports a requirement that the winning bidder tender a ten to 20 percent deposit to the Commission within 30 days of the auction date, subject, of course, to the installment payment rights of Designated Entities. Failure to make the deposit within that period would automatically cancel the winning bid, with forfeiture to the Commission of the advance payment, unless good cause were shown for an extension of time. The advance payment and deposit should also be forfeited by any applicant failing to achieve the award of the license for which it applied, again subject to the Commission's discretion to refund such an amount on a showing of good cause.<sup>8/</sup>

**E. Pretests of winning bidders.**

15. Pursuant to Section 309 of the Communications Act of 1934, as amended, Palmer believes the Commission is require to place winning applications on public notice for public comment, including petitions to deny. Should a substantial and material question of fact be raised regarding an applicant's qualifications, the Commission should undertake to the extent possible to conduct

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<sup>8/</sup> Palmer further suggests that no minimum bid be set for any radio service. To the extent spectrum has value, the auction will compensate the government for its value. It disserves the public interest to decline to make spectrum available merely because it fails to bring the price expected.

any required hearing on paper, except to the extent that oral evidentiary hearings are necessary for fact finding, for example, where credibility and character qualifications are presented. Entirely paper hearings before the staff do not appear to comport with the provisions of the Administrative Procedures Act, or Section 309, despite the advantage the Commission may perceive those procedures to have in expediting ultimate license award.

### **III. Conclusion.**

16. Palmer supports the FCC's efforts to expeditiously implement competitive bidding procedures that are equitable and inclusive of all interested and qualified bidders. The system of preferences for Designated Entities discussed herein should help ensure opportunity for small businesses, minorities and women, and encourage the development of PCS throughout the country. In awarding such licenses, the Commission should not be guided by merely increasing the revenues to the government. Instead, substantial efforts should be made to ensure that the benefits of PCS entrepreneurship are distributed to all segments of society.

Respectfully submitted,

**PALMER COMMUNICATIONS INCORPORATED**

By: \_\_\_\_\_

Gerald S. McGowan  
George L. Lyon, Jr.  
Its Attorneys

Lukas, McGowan, Nace & Gutierrez, Chartered  
1819 H Street, N.W., Seventh Floor  
Washington, D.C. 20006  
(202) 857-3500

November 10, 1993